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DEC 24
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 42. –

THE STATE OF UTAH,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE STATE OF UTAH, PETITIONER.

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Previous Opinion in the Present Case.

The opinion of the Circuit Court of Appeals for the Tenth Circuit is reported in 46 Fed. (2d) 980 (1931), and appears at R. 611-625. No opinion was rendered by the United States District Court for the District of Utah. The judgment and decree of the District Court appear at R. 97-98.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered January 14, 1931 (R. 626). Petition for writ of certiorari was filed April 6, 1931, and granted May 18, 1931 (R. 630), pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (U. S. C. Title 28, Sec. 347.)

Statutes Involved.

The Act of July 16, 1894 (28 Stat. 109) (sometimes hereinafter referred to as the "Enabling Act"), provides as follows:

* * * * * * *

"Sec. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: PROVIDED, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

* * * * * * *

"Sec. 8. That lands to the extent of two townships in quantity, authorized by the third section of the Act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the

State of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said Territory may be selected by said State. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this Act, and including all saline lands in said State, are hereby granted to said State, for the use of the said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said State; and the income thereof to be used exclusively for the purposes of such university and agricultural college respectively.

* * * * * *

"Sec. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only."

* * * * * *

"Sec. 12. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said State, and in lieu of any claim or demand by the State of Utah under the Act of September, twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant

of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to said State of Utah, the following grants of land are hereby made to said State for the purposes indicated, namely:

"For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the establishment and maintenance of an insane asylum, one hundred thousand acres; for the establishment and maintenance of a school of mines in connection with the university, one hundred thousand acres; for the establishment and maintenance of a deaf and dumb asylum, one hundred thousand acres; for the establishment and maintenance of a reform school, one hundred thousand acres; for establishment and maintenance of State normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, one hundred thousand acres; for a miners' hospital for disabled miners, fifty thousand acres. The United States penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefor are hereby granted to the State of Utah.

"The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the State may provide.

"Sec. 13. That all land granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior, from the unappropriated public lands of the United States within the limits of the said State of Utah.

* * * * * * *

Section 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099 (U. S. C. Title 43, Sec. 1166), provides in part:

> "Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years of the passage of this act, and suits to vacate and annual (annul) patents hereafter issued shall only be brought within six years after the date of the issuance of such patents . . ."

The Act of March 2, 1896 (29 Statutes at Large 42, ch. 39) which amended the Act of March 3, 1891, provides, in part, as follows:

> "" . . That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon-road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought, maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry.

Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the Court to be a bona fide purchaser, a Court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such a suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States Court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the Second Session of the forty-ninth congress.

Sec. 3. That if at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented

or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for such land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

Statement of the Facts.

This litigation concerns the title to 5,564.28 acres of coal land located in Carbon County, Utah.

The United States in the "Enabling Act" (*supra*, p. 2) made a grant of many thousands of acres of land to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. This grant was made in lieu of land for purposes of internal improvement made to new states." This was not a specific but a "floating" grant of unappropriated public lands. While this grant "neither expressly

includes mineral lands nor expressly excludes them" from those to be selected by the State, this Court has subsequently indicated that it did not include lands which at the time of selection were known to be mineral in character. See *United States* v. *Sweet*, 245 U. S. 563 (1917); *Independent Coal & Coke Company* v. *United States*, 274 U. S. 640, 642 (1926) and Section 2318 R. S. (30 U. S. C. A. 21).

Selections were to be made by the State of Utah with the approval of the Secretary of the Interior in such manner as the State legislature should provide. In 1896 the Legislature of the State created the State Board of Land Commissioners with authority to select particular lands under these grants, (Laws of Utah, 1896, Ch. 801), and to take such action as should prove necessary to obtain a final transfer of the title to the State.

Between 1900 and 1904 Stanley B. Milner and certain of his associates and relatives (hereinafter sometimes referred to as the Milners) applied to the State Board of Land Commissioners to purchase the lands involved in this litigation. Agreements were entered into with the State whereby the State undertook to select the lands in accordance with the terms of the Act of July 16, 1894, and "when so selected and patented to the State" to "sell to affiant the same at private sale, for one Dollar and 50 cents per acre". In these agreements the Milners agreed to purchase the land at the stipulated price and to release the State from its obligation to sell "if the said land shall hereafter be determined to be mineral in character" (R. 312-325).

These applications were accompanied by affidavits that the applicants were well acquainted with the lands and that they were non-mineral in character (R. 312-325).

> "* * * The state board relied upon the truthfulness of the affidavits and its president and secretary made

affidavit that the board had caused said lands to be examined, and that they were non-mineral. The state board then filed these documents with the local register and receiver of the United States Land Office at Salt Lake City, who certified that the lands were not listed on the survey as mineral lands, whereupon all papers were forwarded to the Commissioner of the General Land Office at Washington, and in reliance thereon the lands were certified to the state of Utah between 1901 and 1904. The agreement of the Milners to purchase then attached, under which the Milners had ten years to pay the purchase price, $1.50 an acre" *United States* v. *Carbon County Land Co.*, 46 F. (2d) 980, pp. 981-982.

Instruments described as "Certificates of Sale" were issued by the State to the Milners certifying that the lands had been sold to the Milners and undertaking, upon the prompt payment of the purchase price and full compliance with the laws of the State of Utah governing the Public Lands, to issue patents for the land. It is apparent from these provisions that the "Certificates of Sale" did not purport to convey legal title to the lands to the Milners. The certificates recited that an amount equal to twenty-five cents per acre had been received on account of the purchase price and provided for the payment of the remainder in ten equal annual instalments. It was agreed that "in case default be made in said payments * * * this certificate shall become null and void * * * and the title to said land revert to and revest in the State of Utah" (R., 325-339).

The Milners assigned all of their right, title and interest in and to the land to the Carbon County Land Company, a corporation in which Stanley B. Milner owned 97.95 per cent. of the stock. 46 F. (2d) 980, 982 (1931).

On January 7, 1907, the United States commenced an action against the Milners and their assignee (*United States* v. *Truth A. Milner, et al.*, 228 Fed. 431), alleging that the lands were mineral in character and did not pass under the grant from the United States to the State; setting up that the certifications from the United States to the State of Utah were procured by the fraudulent representation of the Milners and were therefore void and praying that the contracts between the Milners and the State of Utah be declared void and that the defendants be directed "to surrender up to the State of Utah for cancellation any and all" such contracts (R. 175-216).

The day after the complaint was filed F. E. Maynard, Special Assistant to the Attorney General of the United States, who commenced and carried on the Milner suit, appeared before the State Board of Land Commissioners and handed them a copy of the bill of complaint, pointed out that the State of Utah was not made a party to the action, and assured the Board that the United States was seeking merely to relieve the State of Utah from its contracts with the Milners and that the title to the lands was in the State of Utah and would remain in the State of Utah if the suit of the United States were successful (R. 263-266; see also Stipulation, R. 276). In apparent reliance upon this statement of Maynard the State of Utah did not intervene in the Milner case.

It is now apparent that these lands were in fact underlain by valuable coal deposits. There was, however, no exposure of commercially valuable coal on these lands at the time when they were certified to the State of Utah. At that time the United States Land Office in Utah and the State Land Board were subject to a rule promulgated by a Commissioner of the General Land Office to the effect "that

lands cannot be classed as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres exposed for sale" (R. 387).* This ruling was in line

* Mr. J. C. Dick, a witness on behalf of the defendants, testified that he had been a surveyor for the Government in the year 1900 or thereabouts; that he was familiar with the duties of a surveyor acting for the Government making reports on Government tracts and that:

> "I think I remember the instructions I was given at that time. Those instructions emanated from the Surveyor-General's office of the United States. All surveyors have the same instructions in this intermountain country. We were instructed to report all lands as coal lands upon which coal outcropped only. I tried to carry out those instructions. That was the general practice among the persons surveying for the Government. It was returned to the Surveyor-General's office in connection with my field notes for record, and they were made and filed here in the General Land Office" (R. 569).

And again:

> "I reported as coal lands all lands upon which a coal outcrop appeared. Where there was a quarter section of 40 acres, a subdivision upon which no coal appeared, it was not reported as coal land. In other words, unless there was an outcrop on each forty-acre tract, I didn't report that particular tract as coal land" (R. 569).
>
> * * * * * *
>
> "If I didn't find any coal outcropping, I would report it as grazing land, or agricultural land, whatever it was."

This testimony shows that it was the general practice of the Government to regard that as coal land upon which there was an outcrop, and to regard that as agricutural or grazing land upon which there was no outcrop.

Mr. E. D. Dunn, a witness in the case of *United States* v. *Truth A. Milner, et al.*, testified that he had been a clerk in the United States Land Office, Salt Lake City, Utah, since December 16, 1902. He stated that:

> "I know, as a matter of fact, however, that under the rules and regulations, special or general, of the Commissioner of the General Land Office and Secretary of the Interior, that the local land office were not permitted to receive coal declaratory statements upon any of the public lands other than those upon which an exposure of coal had actually been made" (R. 521).

with many decisions of the Department of the Interior to the effect that there must be an actual discovery of mineral, in some quantity at least, before land could be held to be mineral in character and that it was not sufficient to prove that the lands lay in a mineral belt and that neighboring tracts contained minerals. *Scott* v. *Sheldon,* 15 L. D. 361 (1892); *John E. Williams,* 11 L. D. 462 (1890); *Commissioner of Kings County* v. *Alexander,* 5 L. D. 126 (1886); see also *Colorado Coal & Iron Co.* v. *United States,* 123 U. S. 307 (1887). The affidavits filed by the Milners (p. 8, *supra*) were therefore consistent with the policy which the Department of the Interior had established and were not fraudulent when judged by its rulings. In 1914, or approximately ten years after the lands were certified to the State of Utah, this rule of the General Land Office was in effect rejected by this Court in the Case of *United States* v. *Diamond Coal & Coke Company,* 233 U. S. 236 (1913). In that case it appeared that lands had been certified to the Diamond Coal & Coke Company in reliance upon affidavits stating that the land was non-mineral in character. The evidence clearly indicated, however, that the affidavits were knowingly and wilfully fraudulent. This Court held that the lands were fraudulently acquired and stated that:

> "There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate" (p. 249).

The *Milner* case was tried in 1910. The evidence disclosed that there were no outcroppings of coal on the land:

> "* * * thus presenting the same legal question as the *Diamond Coal & Coke Company* case, then on appeal; the trial court therefore awaited the decision in that case. When that case settled the law, the trial court in June, 1914, decreed the United States to be the 'owner and entitled to the possession' of the lands involved, quieted its title against the defendants and all claiming under them, decreed that defendants had no title or right to possession to any part of the property, and perpetually enjoined them from asserting any claim thereto." 46 F. (2d) 980, 983.

This decree was affirmed by the Circuit Court of Appeals on November 15, 1915. 228 Fed. 431, Appeal Dismissed 248 U. S. 594 (1918).

In January, 1920, six years after the entry of the decree in the Milner suit, the State of Utah entered into a contract with the Carbon County Land Company whereby the State agreed to sell and the company to purchase the land involved in this suit for $556,428, payable as follows: $100,000 on or before January 1, 1931; $200,000 on or before January 2, 1940, and $256,428 on or before January 2, 1950. This indebtedness was evidenced by promissory notes and secured by a purchase money mortgage covering the land (R. 384-386; R. 586-589). All of the notes bear interest on and after January 2, 1925, at the rate of 5% per annum until maturity and thereafter at the rate of 8% per annum. On February 10, 1920, the State of Utah issued its patent to the Carbon County Land Company (R. 382-386).

In October, 1920, the Carbon County Land Company sold 1,120 acres of this land to the Independent Coal and

Coke Company, a Wyoming corporation. In payment for this land the Independent Coal and Coke Company assumed the indebtedness standing against this land in favor of the State of Utah amounting to $112,000 and gave the Carbon County Land Company approximately 360,000 shares of its capital stock, having a par value of $1.00 per share and a market value of not less than 60¢ per share. In addition the Independent Coal and Coke Company entered into an agreement with the State of Utah whereby the State undertook to convey the 1,120 acres to the Independent Coal and Coke Company upon payment to the state of the sum of $112,000 (R. 425, 436, 409). Thereafter the Independent Coal and Coke Company entered into possession of the land so purchased and since the date of its occupancy and prior to the institution of this suit in 1924, has paid to the State of Utah approximately $40,000 in taxes (R. 104).

On May 16, 1924, the United States filed a bill in the District Court against the Carbon County Land Company and the Independent Coal and Coke Company. The bill sought to have the Carbon County Land Company and the Independent Coal and Coke Company declared constructive trustees of the 5,564.28 acres of land involved in this suit and prayed that the defendants be ordered to convey to the United States whatever title they had derived from the State of Utah. The Trial Court dismissed the bill on the ground that the relief was barred by the Statute of Limitations. Upon appeal this ruling was reversed. *United States* v. *Carbon County Land Company,* 9 F. (2d) 517 (1925). On certiorari, this Court affirmed the decision of the Circuit Court of Appeals on the ground that the suit was in the nature of a supplemental bill in aid of the decree of 1914 and that it was therefore not barred by the Statute of Limitations which was specifically applicable to suits to

vacate and annul patents only. *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640 (1926).

On the return of the mandate of this Court to the United States District Court for the District of Utah, the original bill of complaint was amended (R. 1). The State of Utah then intervened and set up its mortgage, and prayed that its title be quieted as against the United States (R. 36).

The United States, after making unsuccessful objections to this intervention on the part of the State, filed its answer to the complaint in intervention, and also its counterclaim against the State of Utah (R. 70). In this counterclaim, the United States claimed the title to the land, and prayed, among other things, that the Court adjudge and decree that "the title of the United States of America in and to said lands be quieted against all claims and demands of the State of Utah" and in the alternative that the certifications of said land "*so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up to be cancelled, and that the Court, by its decree, cancel and annul the same*". (Italics supplied.) (R. 92.)

The State of Utah replied to this counterclaim, denying in substance that the lands were of a known mineral character on May 9, 1904, or at any time prior thereto, and alleging that the lands were classified as non-mineral, and that never, at any time until the commencement of the action on January 8, 1907, had the United States pretended or claimed that the lands were of a known mineral character. The State also alleged that the cause of action set forth in the counterclaim of the United States was barred by virtue of the provisions of Section 8 of the Act of Congress dated March 3, 1891, which provides that suits by the United States "to vacate and annul any patent" shall only be brought

within six years after the date of the issuance of such patents. The State of Utah then prayed "that the United States take nothing by reason of said counterclaim; that said counterclaim be dismissed for want of equity; and • • • that the lands described in said counterclaim and in the complaint of the plaintiff be decreed to the State of Utah, and that the State of Utah be decreed to be the absolute owner of said lands, both legal and equitable, as against all claims of the United States" and for general relief (R. 95-96).

Upon a hearing the Trial Court entered a decree that the State of Utah is, as against the United States, the owner of the lands in controversy (R. 97-98).

In reversing the decision of the Trial Court, the Circuit Court of Appeals held that (46 F. (2d) 980 (1931)):

I. Although the State of Utah was not a party to the suit entitled *United States* v. *Truth A. Milner, supra*, it was bound in equity by the decree entered in that case in 1914 which established the United States to be the "owner and entitled to the possession of the land involved" (R. 621).

II. The limitation of the Act of 1891 was not available to the State of Utah on the theory that this is an action to impress a trust on such title as the State has retained and is in aid of the decree of 1914 and not an action to annul a patent within the meaning of the Act of 1891 (R. 621).

III. The lands were known mineral lands at the time they were selected by the State and were procured from the United States by fraudulent misrepresentation (R. 622).

Specification of Errors to be Urged.

1. The Court below erred in holding that under the peculiar circumstances of this case the State of Utah is bound by the decree entered in 1914 in the case entitled *United States* v. *Milner, et al., supra*. (See Petition for Writ of Certiorari, page 9, errors Nos. 6, 7, 8, 10, 11 and 12.)

2. The Court below erred in holding that as against the State of Utah this action is not barred by the limitations prescribed by Section 8 of the Act of March 3, 1931. (See Petition for Writ of Certiorari, page 8, errors Nos. 2, 3, 4 and 5.)

3. The Court below erred in holding that, as to the State of Utah, the lands involved in this case were known mineral lands and that there was therefore a material misrepresentation of the facts as to the character of the lands. (See Petition for Writ of Certiorari, page 8, error No. 1.)

Summary of the Argument.

1. The Circuit Court of Appeals committed error in holding that the State of Utah was bound in equity by the decree entered in 1914 in the case entitled *United States* v. *Milner, et al., supra*. That action was brought in the District Court of the United States for the District of Utah. The State of Utah was not a party. It did not intervene. Under these circumstances the effect of the ruling of the Court below is to subject the State of Utah to the jurisdiction of the District Court without the consent of the State and in violation of the purpose and intent of Article 3 of the Con-

stitution. Nor can this ruling of the Court below be sustained on the theory that the State of Utah derived its title under the Carbon County Land Company. The State of Utah held a purchase money mortgage from the Carbon County Land Company but the holder of a purchase money mortgage executed as part of a transaction involving the transfer and sale of real property is not a privy in title of its mortgagor and is therefore not bound by a prior decree against such mortgagor.

2. Section 8 of the Act of March 3, 1891, which provides that suits by the United States "to vacate and annul any patent * * * shall only be brought within six years after the date of the issuance of such patent", bars the right of the United States as against the State of Utah and has the effect of conferring ownership of the lands on the State. The lands involved in this suit were conveyed to the State of Utah between 1901 and 1904 by certification of the Secretary of the Interior. Prior to the commencement of this suit no action was taken by the United States to annul or in any way adversely affect the legal title to these lands held by the State. The present action was commenced on May 16, 1924, or about twenty years after the date of the last certification of title to the State. It is therefore apparent that the present action was not commenced within six years after title to the lands was conveyed to the State of Utah by certification. It is also apparent that the word "patent" as used in the Act of March 9, 1891, includes both "patent" and "certification". This, in effect, was indicated by this Court in *United States* v. *Winona & St. Peters Railroad Company*, 165 U. S. 463 (1896). That case involved the Act of March 2, 1896, which amended and supplemented Section 8 of the Act of March 3, 1891, by

extending the limitation contained in that section. This Court clearly stated that the word "patent" as used in the Act of 1896 was intended "to confirm the title which in this case passed by certification to the State". This definition of the word "patent" is in accord with the practice of the Land Office which, both before and after the passage of the Act of March 3, 1891, has consistently employed the word "patent" to include both "patent" and "certification" and is entirely consistent with the use of the word "patent" in other legislation. The pleadings of the United States apparently proceed upon the theory that although by operation of the Statute of Limitations the government may not bring suit to annul its patent it may nevertheless recover the land by impressing a trust on its title. It is a fundamental conception of equity, however, that no one can impress a trust on real property who is not the owner of the equitable estate. Inasmuch as the running of the Statute of Limitations has the effect of obliterating completely the equitable title of the government, it cannot succeed in this action on the theory that the land is impressed with a constructive trust in its favor.

3. The Circuit Court of Appeals committed error in holding that the lands were obtained by the State of Utah as a result of a material misrepresentation of the known facts as to the character of the lands. The land was certified to the State of Utah in reliance upon affidavits which it submitted stating that the lands were non-mineral in character. There was in fact no exposure of commercially valuable coal on these lands at the time when they were certified to the State of Utah. At that time the United States Land Office in Utah and the State Land Board were subject to the rule promulgated by the General Land Office

to the effect that there must be an actual discovery of mineral in some quantity at least before land can be held to be mineral in character and that it is not sufficient to prove that the land lies in a mineral belt and that neighboring tracts contained minerals. The affidavits submitted on behalf of the State were correct when tested by this rule. This rule was not specifically rejected by this Court until ten years later in the case of *United States* v. *Diamond Coal & Coke Co.*, 233 U. S. 236 (1913). The decision of the Circuit Court of Appeals rests therefore upon the retroactive application of a standard of conduct adopted ten years after the certifications were made and is in conflict with the rule that the legality of an act shall be determined by standards existing at the time of its commission. Moreover, the record in the Milner case was not admissible in this case as evidence against the State of Utah for any purpose touching upon the merits of its claim and it is apparent that the Court below relied largely upon the record in the Milner case as proof of fraud. *Tindal* v. *Wesley*, 167 U. S. 204 (1896).

Argument.

The Court below stated that "the State's position in this case is not entirely worthy of it" (R. 622).

Briefly stated, the position of the State of Utah in this litigation is this:

When this suit was commenced the Statute of Limitations had long run against any proceeding by the Government to cancel or annul the certifications under which the State received its title to these lands. The State takes the position that the Statute of Limitations is a statute of repose, whose principles are founded on matters of public

policy, the ethics and morality of which have long ceased to be matters of controversy. It is submitted that in the discharge of its fiduciary duties the State of Utah has, and *a fortiori* its executives have, no right to waive the substantial rights of its citizens either in a spirit of generosity or because the invocation of the Statute of Limitations must necessarily have the effect of preventing a full trial of all of the issues which the Government has attempted to raise in this case.

I.

The State of Utah is not concluded or estopped by the decree entered in 1914 in favor of the United States against the Carbon County Land Company and the Milners in a suit in which the State of Utah was not a party.

The Circuit Court of Appeals for the Tenth Circuit held in this case that the State of Utah was bound in equity by the decree entered in 1914 in favor of the United States against the Milners.

The action against the Milners concerned 5,564.28 acres of coal land located in Carbon County, Utah. The Court in that case adjudged and decreed the "United States to be the true and lawful owner of the said lands" and restrained and enjoined the defendants "from setting up or making any claim to or upon said premises or any part thereof, and all claims of said defendants, and each of them, are hereby quieted" (R. 4). The same lands are involved in this suit.

The State of Utah was not made a party in the Milner suit. The United States might have brought suit in this

Court directly against the State of Utah. It chose instead to bring its action in the District Court of the United States and to confine it to private parties only. It is true that a copy of the complaint was left with the State Board of Land Commissioners. But at the same time that Board was advised by the Special Assistant to the Attorney General who commenced and carried on the Milner suit, that the United States was seeking merely to relieve the State of Utah from its contracts with the Milners and that if the suit of the United States were successful, title to the land would remain in the State of Utah.

It is submitted that under such circumstances the State of Utah is not bound in equity by the Decree of 1914 for the reasons that:

A. In the absence of "peculiar circumstances" the State will not be concluded or estopped by any judgment entered in any suit to which it is not a party.

The mere existence of this litigation is in effect an indication that the State of Utah was not bound by the Decree of 1914. The parties subject to that decree were perpetually divested of title to the lands. Consequently if they subsequently occupied the lands under claim of title they might have been treated as trespassers and ousted from possession either by ejectment or by contempt proceedings. But this is not such a proceeding. It is an action to impress the lands with a constructive trust. Such an action seems inconsistent with the claim that title was completely and perpetually divested by the Decree of 1914, because a constructive trust cannot be established or created against a defendant who, at least, has not some semblance of title.

Many decisions of this Court have clearly established that a judgment in an action to which a State is not a party

will not conclude or estop it. This doctrine is peculiarly applicable, where, as in this case, the effect of a contrary ruling would be to subject the State to the jurisdiction of the District Courts without the consent of the State. This would seem clearly to contravene Article 3 of the Constitution which, in effect, provides that without its consent a State may be sued by the United States in the Supreme Court of the United States only. *United States* v. *Texas*, 143 U. S. 621 (1892); *United States* v. *North Carolina*, 136 U. S. 211 (1889).

The reasons for this rule were discussed in *Tindal* v. *Wesley*, 167 U. S. 204 (1896). That was a suit between citizens of New York and citizens of South Carolina to recover the possession of certain real property located in South Carolina and to recover damages for withholding possession. The State was not made a party and did not intervene. One of the defendants answered that he was the Secretary of State of the State of South Carolina and that he held custody and possession of the property solely by virtue of his office and that the premises were the property of the State of South Carolina. The other defendant stated that he was engaged on behalf of the State "in watching, guarding and taking care of the said premises" (p. 206).

At the close of the testimony the defendants raised the question whether the suit was not in effect one against the State so that "the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and control, is to be deemed an action against the State, within the meaning of the Constitution, * * * And if the Court finds * * * that the plaintiff is entitled to possession, and that the assertion by the defendant of right of possession

and title in the State, is without legal foundation, may it not, as between the plaintiffs and the defendants, adjudge that the plaintiff recover possession," (p. 212).

This Court held that the answer to this question was "Yes". It was urged, however, that the effect of such a ruling would be to conclude the State of South Carolina in an action in which it was not a party. This contention was rejected by this Court as follows:

> "It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. *The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim.* It was insisted in *United States* v. *Lee*, in support of the contention there made, that a judgment in favor of Lee against the persons who, as agents of the United States, held possession of Arlington would be in effect a judgment against the United States. But this court said: 'Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit

against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of *Carr v. United States,* 98 U. S. 433, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution.' 106 U. S. 222" (p. 223). (Italics supplied.)

Similarly in this case the Decree of 1914 does not conclude or estop the State of Utah. It is a judgment to the effect only that as between the United States and the Milners, the United States is the full owner of the land. Since the United States failed to bring action against the State of Utah, it has obtained no judgment binding upon the State. The right and title of the State of Utah not having been determined by the Decree of 1914, the State in this action is entitled to have its defense fully considered and the record in the Milner case cannot "be evidence against it for any purpose touching the merits of its claim".

In *Carr* v. *United States*, 98 U. S. 433, 437 (1878), the United States filed a bill to quiet title to certain lots in the City of San Francisco. The appellants relied largely on judgments rendered in the State courts against the agents of the Government having possession of the land. It appeared that the United States District Attorney for the District of California had appeared for the defendants in these actions. It was therefore contended that this made the United States a virtual party to the actions and "that by the law of California a judgment in ejectment is an estoppel; and that where a tenant or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action * * *."

But again this argument was rejected:

> "Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the government of the United States. We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the government suable in its courts."

The United States in this case relies almost entirely on judgments against certain alleged agents of the State of Utah. It is contended that the State is a virtual party to the action because it had notice of the action and did not intervene. But this argument would compel a State to submit to suit in a District Court. Not only is it fundamental law that the Government cannot be sued in the State Courts except by its own consent, but also that a

State may not be sued by the United States in a District Court without its consent.

See also *Iron Cliffs Co.* v. *Negaunee Iron Co.*, 197 U. S. 463 (1904); *United States* v. *Lee*, 106 U. S. 196 (1882); *Hussey* v. *United States*, 222 U. S. 88 (1911); *Hopkins* v. *Clemson Agricultural College of S. C.*, 221 U. S. 636 (1910); *Goltra* v. *Weeks*, 271 U. S. 536 (1925); *McClellan* v. *Carland*, 217 U. S. 268 (1909); *Scranton* v. *Wheeler*, 179 U. S. 141 (1900).

Inasmuch as the State of Utah was not a party in the Milner action and since it did not intervene it is apparent, on the authority of the cases cited, that the State is not concluded or estopped by the Decree of 1914.

B. The State of Utah is not concluded or estopped by the decree of 1914 by reason of the "peculiar circumstances of this case."

The Circuit Court of Appeals held that "It is therefore our conclusion that, under the peculiar circumstances of this case and under the doctrine of the *Williams* case (*Williams* v. *United States*, 138 U. S. 514 (1891)), the State is bound, in equity, by the decree of 1914". Its reasons for this conclusion are stated as follows:

> "The state intervened, and prays that its mortgage be adjudged a lien on the lands. It asserts that it was not a party to the Milner suit, and it was not; it concludes that it is not bound by the decree therein. But the conclusion does not follow. The state has parted with the title; the interest it now claims is a mortgage, taken from the Carbon County Land Company. As such mortgagee, it holds under that company; it cannot assert that it acquired its mortgage without knowledge of the infirmity of its grantor's title, and is not therefore entitled to the protection afforded a bona fide purchaser; as a privy

in title it is bound by the decree under familiar rules.

"The argument for the state is predicated upon the assumption that it is an ancester in title to the Carbon County Land Company, rather than a privy It is doubtful if this is a fair assumption, since the state has seen fit, for purposes of its own, to part with its title unconditionally, and take back a mortgage. But assuming that the holder of a purchase-money mortgage has the same rights as one who has retained the title and merely contracted to sell, we come to the same conclusion. The government did not join the state, which then was innocent of intentional wrong, as a party defendant in the Milner case, but followed the procedure approved in Williams *v.* United States, 138 U. S. 514. * * * But it did serve upon the state, through its Land Board, a copy of the bill of complaint the day after it was filed. That bill alleged the facts as to the misrepresentation, and further 'that all of the aforesaid certified selections of the aforesaid lands should be declared null and void and of no effect, and all the conveyances by which any of the defendants claim right of possession or title to said lands herein described, should be set aside and held for naught, and complainant should be fully restored to the possession of said lands, and all clouds upon the title removed therefrom.' It was also cited to the decision of the Supreme Court in the Williams case, which held that a state, in [illegible]lar situation, might intervene, or pursue the more dignified course of disclaiming any interest in the controversy and conforming its subsequent conduct to the decree of the court. The State of Utah followed neither course; it did not intervene; neither did it conform. It is therefore our conclusion that, under the peculiar circumstances of this case and under the doctrine

of the Williams case, the state is bound, in equity, by the decree of 1914'' (46 F. (2d) 980, 986).

It appears from this statement that the decision of the Circuit Court of Appeals rests upon the following propositions:

(1) The State of Utah is bound by the Decree of 1914 as a privy in title of, and holding title under, the Carbon County Land Company, a party to the *Milner* case.

(2) Under the doctrine of the *Williams* case the State of Utah is bound by the Decree of 1914.

These propositions will be considered in the order indicated.

(1) The State of Utah is not bound as a privy in title of the Carbon County Land Company.

The Circuit Court of Appeals held in effect that the State of Utah claimed under the Carbon County Land Company and was bound by the Decree of 1914 as a privy in title.

The pertinent facts are these:

On February 10, 1920, the State of Utah issued to the Carbon County Land Company its patent to the 5,564.28 acres of land involved in this suit. The entire purchase price of $556,428 was payable as follows: $100,000 on or before January 1, 1930; $200,000 on or before January 2, 1940; and $256,428 on or before January 2, 1950. This indebtedness was secured by a purchase money mortgage covering the entire amount of the purchase price. The mortgage was issued as part of the transaction involving the purchase and sale of these lands.

In this regard the Circuit Court of Appeals has assumed that the owner of such a purchase money mortgage is bound

by a prior judgment against its mortgagor. No cases are cited in support of this conclusion.

It appears to be clearly established, however, that a purchase money mortgage executed as a part of a transaction involving the sale and transfer of real property excludes any claim, lien or judgment against the mortgagor which would otherwise have attached. See *Mayburry* v. *Brien*, 15 Pet. (U. S.) 20 (1841); *Jones on Mortgages*, 8th Edition, Volume 1, Section 584 and cases there cited. It is therefore apparent that the interest of the State of Utah in the lands cannot be divested on the theory that its title is subsequent in time and interest to that of the Carbon County Land Company.

(2) The State of Utah is not concluded or estopped by the decree of 1914 by reason of the application of the doctrine announced in the *Williams* case.

The Circuit Court of Appeals held that "under the peculiar circumstances of this case and under the doctrine of the *Williams* case, *supra*, the State is bound, in equity, by the decree of 1914".

The case of *Williams* v. *United States*, *supra*, p. 26, involved land certified by the Secretary of the Interior to the State of Nevada. The appellant, Williams, acquired this land from the State. The United States then filed its bill against Williams alleging that the lands were improperly certified to the State and that the State's contract with the appellant transferred nothing to him and praying for a cancellation of the contract between Williams and the State of Nevada and an adjudication that Williams had no title or interest in and to the lands. A decree was entered divesting Williams of title and directing him to surrender up for cancellation all contracts for the purchase of land which he had with the State of Nevada.

It was urged at the trial that the Circuit Court was without jurisdiction since an indispensable party, the State of Nevada, had not been joined in the action. With respect to this contention this Court stated:

> "* * * The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government. The jurisdiction of the Circuit Court over this bill was properly sustained" (p. 516).

It is admitted that this language is authority for the proposition that Utah was not an indispensable party in the *Milner* suit. It does not mean, however, that the State of Utah must either (1) intervene, or (2) conform its conduct to the decree of 1914.

The language used by this Court states clearly and unequivocally that under the facts of the *Williams* case the State of Nevada, even though not bound by the decree entered in that case, might have been justified in voluntarily conforming its conduct to the decree of the Court. The

facts of this case, however, disclose no similar reason why the State of Utah should conform its subsequent action to the Decree of 1914. When the *Milner* suit was commenced the State of Utah was advised by the Special Assistant to the Attorney General, who commenced and carried on the litigation, that the purpose of the United States in bringing the action *was not to destroy but to protect the title* of the State of Utah and that, if the United States were successful, title to the land would vest in the State. Moreover, in this case it is clear that whatever the legal consequences of the action of the State in applying for the lands there was no intentional fraud on its part. There was no exposure of commercially valuable coal on these lands at the time they were certified to the State. At that time the rule of the Land Department was to the effect that lands cannot be classed as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres exposed for sale. The affidavits upon which the State and the Department of the Interior relied were in line with these decisions. It was only as a result of a later decision of this Court that the rule relied upon was changed. There is, moreover, no evidence in this record to show that, in fact, the State or its agents had actual knowledge that coal underlay these lands.

Nor can it be maintained that the claim of the State of Utah is without substance and based upon technicalities. The State of Utah takes the position that it had a substantial property interest in the lands at the time of the entry of the decree of 1914 and that it has such an interest at the present time.

In the answer of the United States to the complaint in intervention of the State of Utah in this case it is alleged that, "payments, as required under said contracts, were

made as therein provided" (R. 91). This allegation is deemed denied under the Equity Rules (Federal Equity Rules, Rule 31). The United States, however, did not undertake to establish at the trial that the State of Utah had been fully paid. Consequently the record does not show what part of the purchase price was actually received by the State. It is apparent however that the full amount of the purchase price would not have become due and owing to the State of Utah until ten years from the date of the certificates of sale or many years after the commencement of the suit by the United States against the Milners and their assignees (*supra*, p. 9, R. 328-339). It does appear from the record, however, that the applicants were not "to make payment in full for such land and demand the issuance of patent thereto until their rights to acquire title to said lands are adjudicated" (R. 266).

In view of the foregoing it is submitted that the State is now the owner of a substantial property interest in the lands and that the United States has introduced no proof in support of its allegation that the State of Utah was paid in accordance with the terms of its contracts with the Milners.

II.

This suit by the United States against the State of Utah is barred by the operation of the Statute of Limitation.

In its counterclaim in this suit the United States prayed that the title of the United States in and to the lands involved in this suit be quieted as against all claims and demands of the State of Utah and, in the alternative, that

the certifications made to the State of Utah be delivered up and cancelled.

The State of Utah filed its replication, pleading, among other things, that the suit was barred by the provisions of Section 8 of the Act of March 3, 1891 (R. 96).

Section 8 of the Act of March 3, 1891, Chapter 561, 26 Stat. 1095 (U. S. C. A. Title 43, Section 1166), provides:

> "Sec. 8. That suits by the United States to vacate and annul any *patent* heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annual (annul) patents hereafter issued shall only be brought within six years after the date of the issuance of such patents".

This section was later amended by the Act of March 2, 1896, and in determining the meaning of the word "patent" as used in Section 8, the two statutes should be read together.

Section 1 of the Act of 1896 provides as follows:

> "* * * That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall

> be brought, maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

The lands with which this suit is concerned were conveyed to the State of Utah between 1901 and 1904 by certifications of the Secretary of the Interior. The Government now alleges that the certifications were obtained as a result of a material misrepresentation of the facts as to the character of the land.

Assuming *arguendo* that such fraud may be constructively imputed to the State of Utah, it is apparent that the United States had knowledge of the fraud when it commenced suit against the Milners in 1907. No material facts have been subsequently disclosed and the Government in this case relies largely upon the same evidence of fraud submitted in the *Milner* case.

The present action was commenced on May 16, 1924, or about twenty years after the date of the last certification of title to the State, seventeen years after the commencement of the *Milner* suit in 1907, and approximately ten years after the entry of the Decree of 1914. Prior to the commencement of this suit no action was taken by the Government to annul or in any way adversely affect the legal title of the State of Utah. It is therefore apparent that the period of limitation prescribed by the Act of 1891 has run.

The Court below held, however, that as against the State of Utah this is an action to impress a trust on such title as the State has in aid of the 1914 Decree and that the limitation of the Act of 1891 does not apply to such an

act in aid of a Decree. It is nevertheless clear that as against the State of Utah, this is not a suit in aid of the 1914 Decree, for Utah is not bound by that decree. It is an original and independent action by the United States against the State of Utah.

The limitation of Section 8 of the Act of 1891 applies to suits "to vacate or annul patents". The State of Utah acquired title to these lands by certification and not by patent. It is submitted, however, that the word "patent" as used in the Statute of Limitations includes both "patents" and "certifications".

In support of its contention that this suit is barred by operation of the limitation prescribed by the Act of 1891, it is urged that:

1. This Court has in effect determined that the word "patent" as used in the Act of March 3, 1891, includes both "patents" and "certifications".

2. The General Land Office of the Department of the Interior, both before and after the passage of the Act of 1891, has consistently employed the word "patent" to include both "patent" and "certification".

3. Congress has repeatedly employed the word "patent" to include both "patents" and "certifications".

4. The United States may not avoid the bar of the Statute of Limitations by bringing suit to recover the land by impressing a trust on its title.

We shall discuss these propositions in the order indicated.

1. This Court has held in effect that the word "patent" as used in the Act of March 3, 1891, includes both "patent" and "certification".

In the case of *United States* v. *Winona & St. Peter Railroad Co.*, 165 U. S. 463 (1896), this Court held that the word "patent" as used in the Act of 1896 *included* "certification". This holding seems controlling in the case at bar.

The Act of 1896 supplemented and amended Section 8 of the Act of 1891. In amending Section 8 Congress again employed the word "patent". It is not probable that the word patent was intended by Congress to have one meaning in Section 8 and an entirely different meaning in legislation amending that section.

In the *Winona* case, Mr. Justice Brewer, speaking for a unanimous Court, said:

> "Thus in the Act of 1891 it provided that suits to vacate and annul *patents* theretofore issued should only be brought within five years and that as to *patents* thereafter to be issued, such suits should only be brought within six years after the date of issue. Under the benign influence of this statute, it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the *patent* would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. The Act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that Act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold

> titles arising under *certification* or *patent* by providing that after a certain time the Government, the grantor therein, should not be heard to question them" (p. 476). (Italics supplied.)

This statement obviously has reference to Section 8 of the Act of 1891, as well as to the Act of 1896. It clearly indicates that the word "patent" includes "certification". Mr. Justice Brewer then referred to the following provision of the Act of 1896:

> "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

The Court then stated:

> "We are of the opinion that Congress intended by the sentence we have quoted from the Act of 1896 to confirm the title which in this case passed by certification to the State" (p. 477).

In other words, the Court unanimously declared that the limitations of the two acts apply to certifications as well as patents, for if there were any legal distinction between patents and certifications, the limitation of the Act of 1896 could not have been applied to the land in question as it had been certified to the State of Minnesota.

See also *Deweese* v. *Reinhard,* 165 U. S. 386 (1896); *Shaw* v. *Kellogg,* 170 U. S. 312 (1897); *Langdeau* v. *Hanes,* 88 U. S. 521 (1874); *Curtner* v. *United States,* 149 U. S. 662, 675 (1892); *McCreery* v. *Haskell,* 119 U. S. 327 (1886); *Frasher* v. *O'Connor,* 115 U. S. 102 (1884).

The opinion of the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Kern River Company,* 264 Fed. 412 (1920), is apparently inconsistent with the state-

ment of this Court in the *Winona* case (*supra*, p. 36). In the *Kern River* case the Circuit Court stated that:

> "It is a well-established rule that statutes of limitation do not run against the sovereign, in the absence of some express statutory provision to the contrary, * * *. And had Congress intended that the bar of the statute should apply not only to patents but to all legislative grants, it would have so provided in express terms. * * * " (p. 416). See also *United States* v. *Amalgamated Sugar Co.*, 48 F. (2d) 156 (1931).

On appeal to this Court the decree of the Circuit Court of Appeals was modified and affirmed. The decision of this Court, however, did not rest upon the bar of the Statute of Limitations and did not touch upon the question whether the word "patent" included "certification" (257 U. S. 147 (1921)). The language of the Circuit Court is therefore not controlling in this case.

On the authority of the *Winona* case and the decisions of this Court which are cited above, it is submitted that the word "patent" as used in the Act of 1891 includes "certifications" and that this suit by the United States against the State of Utah is barred by operation of the limitation of that Act.

2. The General Land Office of the Department of the Interior, both before and after the passage of the Act of 1891, has consistently employed the word "patent" to include both "patent" and "certification".

The practice of the General Land Office of the Department of the Interior has been entirely consistent with the holding of this Court in the *Winona* case, *supra*. It was there established that the word "patent" includes both "patent" and "certification".

The following decisions of the General Land Office are given as examples of the way in which the Department of the Interior has interpretated the meaning of the word "patent".

In *Smith* v. *Portage Lake and Lake Superior Ship Canal Co.*, 11 L. D. 475 (1890), decided one year prior to the adoption of the Act of 1891, it was stated that:

> "The granting act contains no provision requiring the issuance of patents for the land selected but simply said that such selections shall be made by an agent or agents appointed by the State subject to the approval of the Secretary of the Interior. This approval is the only act required to divest the Government of the title to the land selected and to invest that title in the State *and it is therefore the equivalent of patent.*" (Italics supplied.)

Similarly in *Cole* v. *State of Washington*, 37 L. D. 387 (1909), the word patent was held to include certification. In that case the plaintiff and others claimed lands which had been certified by the United States to the State of Washington. The claim was refused on the ground that certification was equivalent to patent and that title had therefore been conveyed to the State. The opinion states:

> "Moreover, it has been repeatedly held by the department that where patent is not required by the statutes, certification is equivalent thereto and the validity thereof can only be questioned in the courts * * *"
>
> "From this it will be seen that the court regards certification as equivalent to patent and that where limitation is imposed by Congress *to the institution of suit to cancel patent the same limitation applies when in the absence of patent, certification is equivalent thereto.*" (Italics supplied.)

See also *Garriques* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 6 L. D. 543 (1888); *Iowa Railroad Land Co.* v. *Sloan*, 9 L. D. 597 (1889).

This Court has recently recognized that:

> "* * * in the interpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight and will not be disturbed except for cogent reasons." *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 757 (1930).

It seems therefore that the practice of the General Land Office of the Department of the Interior is persuasive that the word patent, as used by the Act of 1891, includes "certification" as well as "patent".

3. Congress has repeatedly used the word "patent" to include both "certification" and "patent".

A review of Congressional legislation dealing with land grants indicates that Congress has repeatedly employed the word "patent" to include both "certification" and "patent". This history suggests that the Congress intended Section 8 of the Act of March 3, 1891, to have application to certifications as well as patents.

When the Department of the Interior was created in 1849, the Secretary of the Interior assumed supervision of and control over the General Land Office. By the Act of June 19, 1878, it was provided that all patents should be signed by the President and countersigned by the Recorder of the General Land Office. Certifications, however, were signed by the Secretary of the Interior. Although as a result of this statute a slight distinction was drawn between a formal patent and a certification by the Secretary of the Interior, the Courts nevertheless have continued to

hold that a certification has the same force and effect as the more formal patent. *Frasher* v. *O'Connor*, 115 U. S. 102 (1884). Moreover, Congress has repeatedly employed the word "patent" to include "certification".

In 1887 the Congress of the United States enacted legislation authorizing and directing the Attorney General to commence proceedings to cancel title to railroad land "erroneously or fraudulently certified or patented". 24 Stat. 556. Under the doctrine that lapse of time is not a bar to a suit brought by the United States, this legislation had the effect of leaving the validity of the title to such land in perpetual doubt.

The Act of March 3, 1891, was passed to remedy this situation. Section 8 of that Act provides:

> "Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years of the passage of this act, and suits to vacate and annual (annul) patents hereafter issued shall only be brought within six years after the date of the issuance of such patents * * *."

In 1896 President Cleveland in his message to the Congress pointed out that there were many outstanding disputes involving the validity of land titles derived from the United States and urged in view of this fact that Section 8 of the Act of 1891 be repealed. He stated:

> "In these circumstances, it seems to me that the Act of 1891 should be so amended as not to apply to suits brought to recover title to land certified or patented on account of railroad or other grants." Congressional Record, vol. 28, Part 2, p. 1762. (Appendix I.)

While this recommendation was not followed, the statement is significant as showing that the President of the United States assumed that the word "patent" as used in Section 8 of the Act of 1891 included "certification".

That this was also the opinion of the Land Office is seen in the letter of Commissioner Lamoreaux to the Secretary of the Interior. The Commissioner says:

> "Under the provisions of Section 8 of the Act of March 3, 1891, as originally passed and amended as aforesaid, the time within which the United States can legally bring suit for the recovery of lands erroneously patented prior to March 3, 1891, will expire March 3, 1896, unless an extension be made by Congress.
>
> * * * * * *
>
> "It is clear, therefore, that the time within which the United States may bring suit for the recovery of land erroneously certified or patented under these grants, must be extended * * *." Congressional Record, vol. 28, Part 2, p. 1763. (Appendix II.)

This view was adopted by the Secretary of the Interior, who, in his letter to President Cleveland, stated:

> "Under these circumstances, it seems to me that the Act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants." Congressional Record, vol. 28, Part 2, p. 1762. (Appendix III.)

Following the message of President Cleveland, Congress passed the Act of March 3, 1896 (29 Statutes at Large, 42, Chap. 39), providing, *inter alia*, that any suits brought by the Government to vacate and annul any patents to lands

heretofore erroneously issued under a railroad or wagon road grant could only be brought within five years from the passage of the Act and any suits to vacate and annul patents thereafter issued could only be brought within six years from the date of the issuance of such a patent.

In the first paragraph the word "patent" is used. No reference is made to "certification". But Section 2 speaks of "lands erroneously patented or certified" and Section 3 says that "if at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented or certified", and later "or the corporation . . . for whose benefit the patent was issued or certification was made".

Reading this legislation and bearing in mind the purposes for which Section 8 of the Act of 1891 and the supplementary bill of 1896 was passed, no other conclusion can be reached than that Congress intended to provide some orderly process by which the respective rights of the Government and the grantees could be determined and in addition fix a time when all litigation in respect to government land grants would cease. It would be illogical to believe that Congress intended that controversies with regard to those lands acquired by a formal patent only should be extinguished and that title to lands acquired by the less formal grant—namely, certification—should be open to perpetual controversy.

The legislation dealt with the grant of land itself, not merely the written evidence of it. That this was the opinion of all those concerned with the passing of the bill, the President, Congress and the Land Department, is found in the Report of the House Committee with regard to the Act of 1896. The Report said:

"There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioner of the General Land Office was of the opinion that it would require ten years or more to adjust the grant under the Act of 1887 [which dealt with lands erroneously patented or certified], and therefore thought the limitation should be extended ten years . . ."

* * * * * *

"To remedy these defects the Act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not been found practicable to adjust them within so short a time, we think that a bill giving five years longer limitation ought to pass, but we do not believe that this extension of time ought to affect bona fide purchasers; that as to them the limitation of the Act of 1891 ought to operate as a final bar when the time first limited shall expire" (House Report 253, 54th Congress, 1st Session). (Appendix IV.)

It should be remembered that the Act in relation to bona fide purchasers spoke of lands erroneously patented or certified. It seems, therefore, that Congress intended the limitations to extend to all land grants—not merely formal patents.

The interpretation of the word "patent" as used in these acts, as a general and inclusive term, received legal sanction in the case of *United States* v. *Winona & St. Peters Railroad Co., supra,* where this Court said that the acts in question showed the purpose of Congress was "to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them", and the land office

itself has consistently followed this ruling (*Cole* v. *State of Washington,* (1909) 37 L. D. 387).

Consequently, we find the Congress, The Department of the Interior, which proposed the bill, President Cleveland, who brought it to the attention of Congress, and the Supreme Court, which gave it final legal sanction, agreed on the same interpretation of the Act—namely, that the word "patent" as used in Section 8 of the Act of 1891, and the Act of 1896, applies to and includes the more informal conveyance, the certificate, as well as the conveyance by the formal "patent".

4. In this case the United States may not avoid the bar of the Statute of Limitations by bringing suit to impress the lands with a constructive trust.

The Court below took the position that the Statute of Limitations is not a bar to the bringing of this suit because this is an action to impress the lands with a constructive trust and is not a suit to vacate or annul a patent.

It is believed that the position taken by the Circuit Court does not give due regard to the effect of the bar of the Statute of Limitations relied upon in this case.

In *United States* v. *Chandler-Dunbar Co.,* 209 U. S. 447, 450 (1908), this Court discussed the effect of the limitation of the Act of 1891. In that case it appeared that the United States had filed a bill to remove a cloud upon its title to certain lands. The defendant set up as a bar the limitation set forth in Section 8 of the Act of 1891. The United States replied that the action was not one to vacate and annul a patent but a suit to quiet title. In denying this contention this Court stated:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren,* 2 Black, 599, 605; *Sharon* v. *Tucker,* 144 U. S. 533; *Davis* v. *Mills,* 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States* v. *Winona & St. Peter R. R. Co.,* 165 U. S. 463, 476."

See also *United States* v. *Winona, supra; Elmendorf* v. *Taylor,* 10 Wheat. 152 (1825).

It is apparent from these decisions that the Statute of Limitations pleaded in this case operated as a conveyance to the State of Utah of all of the right, title and interest of the United States in and to these lands, and that it divested the United States of its equitable and legal title. It is a fundamental conception of equity that no one can impress a trust on real property who does not own the equitable estate. See Pomeroy's Equity Jurisprudence, 3rd edition, Section 155. Courts of equity have extended the fundamental principle of trusts—that is, the principle of a division between the legal estate in one and the equitable estate in another—only for the purpose of protecting rights of property. It is apparent in this case, however, that the United States was divested by the Statute of Limitations of all property rights, legal as well as equitable, which it might otherwise have retained in these lands. Consequently this action may not be sustained as a suit to impress a trust upon the interest of the State in and to these lands for the reason that the United States has no legal or equitable estate in this property and conse-

quently the United States has no property right which a court of equity may protect.

The Circuit Court of Appeals further relies upon *Lockhart* v. *Leeds*, 195 U. S. 427 (1904) and *United States* v. *New Orleans Pacific Railway Co.*, 248 U. S. 507 (1918).

Lockhart v. *Leeds* does not appear to throw any light upon the question of the application of the statute. The *New Orleans Pacific Railway Co.* case seems not to be in point for the reason that in that case the United States was suing to protect the rights of third parties, namely, homestead claimants, and was not suing to recover land which it owned or claimed. It is apparent that the statute has no application to such a case for, "the object of that statute is to extinguish any right the Government may have in the land which is the subject of the patent—not to foreclose claims of third parties". *Cramer* v. *United States*, 261 U. S. 219, 233 (1922); see also *La Roque* v. *United States*, 239 U. S. 62 (1915).

It is therefore submitted that the word "patent" as used in the Act of 1891 includes "certifications" and that this suit by the United States against the State of Utah is barred by operation of the limitation of that Act.

III.

Insofar as the State of Utah is concerned the lands were not obtained as a result of a material misrepresentation of the known facts as to the character of the lands.

It has been held that in a legal sense the Milners and their assignees "fraudulently obtained these lands from the United States" (R. 625). The State of Utah, however,

was not a party to the action in which this decision was reached. Consequently the adjudication in the *Milner* case does not estop or bind the State of Utah and the question as to whether the certifications were fraudulently obtained by the State is still open in this case.

In support of the allegations of the United States that the State of Utah obtained these lands as a result of fraudulent misrepresentations, the defendants introduced in this suit the record in the *Milner* case and the testimony given by Joseph A. Taff in that case. The State objected to the admission of this evidence. The Court overruled this objection and allowed exceptions (R. 175). It is submitted that since the State of Utah was not a party to the *Milner* suit this record is not admissible against the State "for any purpose touching the merits of its claim" and that pages 106 to 262 inclusive of the Record may not be considered in support of the allegation of the United States. *Tindal* v. *Wesley, supra.* Since the Court below relied largely upon the Record of the *Milner* case as proof that the lands were fraudulently acquired by the State it seems that the error was clearly prejudicial.

But, assuming *arguendo* that the Record in the *Milner* case and the testimony of Mr. Taff may properly be used as evidence against the State of Utah, there is no proof that, as to the State of Utah, the lands were, in fact, known mineral lands at the time these certifications were made. There was no exposure of commercially valuable coal on the land selected. The rule of the General Land Office in effect at that time was that without such exposure the lands could not be listed as mineral. It was not until ten years after the certifications were made that this court in the *Diamond Coal Company* case, *supra,* rejected this rule of

the General Land Office and declared that the character of mineral land may be established by any satisfactory evidence, including geologic inference. It was in reliance upon a retroactive application of this rule of law that these lands were held to be known mineral lands at the time they were certified to the State.

The result is that when the State obtained these lands from the United States, the certifications by the State were not tainted with any intentional or known fraud judged by existing standards. The lands were represented to be non-mineral in character and were in fact grazing lands. It is submitted that the quality of an act is to be determined by the standards of conduct in force at the time the act is done and that the lands were not fraudulently acquired by the State of Utah. The fact that it has been determined by the lower courts that the Milners and the Carbon County Land Company obtained the land as a result of fraudulent affidavits does not constitute a decision on the merits as to the State of Utah.

The language used by this court in the *Wiona* case, *supra*, applies fairly to the equitable position of the State of Utah in this case:

> "* * * It belonged to the Government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the Government now asks to have that set aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was er-

roneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company in reliance upon the title it believed it had acquired has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained—carried even to this court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely after such a lapse of time, and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts" (p. 474).

Conclusion.

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted,

WILLIAM J. DONOVAN,
Attorney for Petitioner.

GEORGE P. PARKER,
Attorney General of the
State of Utah.

RALSTONE R. IRVINE,
Of Counsel.

Appendix I.

Message of the President of the United States.*

To the Congress:

I desire to invite attention to the necessity for prompt legislation in order to remove the limitation of the time within which suits may be brought by the government to annul unlawful or unauthorized grants of public lands.

By the Act of March 3, 1887 (24 Stats., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted, and it is provided, if it shall appear, upon the completion of such adjustment or sooner, that the lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented, and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute in the proper courts necessary proceedings to restore title to said lands to the United States. The demands made under this act have been numerous, and in some cases have resulted in the reinvestment of title to the lands in the United States upon demand, but in most cases the demand has been refused and suits have been necessary.

The work of adjustment has been unavoidably slow. The said act makes provision for the reinstatement of entries erroneously cancelled on account of railroad withdrawals, and upon certain conditions, provides for the confirmation of titles derived by purchase from the companies of lands shown to be excepted from the grants. It contemplates a disposition of every tract described by the granting act, situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those contracts shown to be erro-

* Congressional Record, vol. 28, Part 2, p. 1762.

neously certified, and the determination for what contracts lost to the grant indemnity is to be allowed.

It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads, the grants for which conflict or overlap, be finally disposed of, so that a proper disposition of the land can be shown in the adjustment. While adjustments have proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers, of the United States and the railroad companies, and while to this end the force of adjusters has been largely augmented in the General Land Office, many of the grants yet remain unadjusted.

In some of the grants, notably the corporation grants, the lack of surveys up to the present time made the completion of the work impossible.

Decisions rendered by the Interior Department in numerous conflicts have been carried into the courts. A construction of the Interior Department has generally been sustained when final determination has been reached, but many of the cases are still pending in the courts, not yet having been decided. Some of these cases, while involving immediately the title to only one particular tract, will, when decided, furnish a rule of construction to control the disposition of the title to thousands of acres of other lands in the same situation. Until the courts pass upon these questions final adjustments cannot be made.

By section 8 of the act of March 3, 1891 (26 Stats., 1099) it is expressly enacted that suits by the United States to vacate and annul any patent theretofore issued "shall only be brought within five years from the passage of this act". This period of five years will expire on the 3rd of March, 1896. Of course, no suit by the United States to secure the cancellation of a patent in this class of cases after that date would be effective. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal, in accordance with the provisions of the act of March 3, 1887. Before the

expiration of this period the statute would bar the right of recovery by the government, and the benefits of anticipated favorable decisions of the courts would be lost, so far as they might determine the character and disposition of grants similar to those directly involved in pending cases.

It will be readily seen that if this act of limitations is to remain on the statute books, the portion of the adjustment act referred to would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by law.

Legislation establishing limitations against the right of the government to sue is an innovation not entirely consistent with the general history of the rights of the government, for it has uniformly been held that time did not bar the sovereign power from the assertion of a right.

The early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees which later decisions of the courts and of the Department have not sustained. It seems clear that the further progress of adjustments will develop facts and transactions in connection with these land grants which ought to be the subjects of legal examination and scrutiny before they are allowed to become final and conclusive. The government should not be prevented from going into the courts to right wrongs perpetrated by its agents or any other parties, and by which much of the public domain may be diverted from the people at large to corporate uses.

In these circumstances, it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully urge upon Congress speedy action to the end suggested, so that the adjustment of these grants may proceed without the interposition of a bar, through lapse of time, against the right of recovery by the government in proper cases.

GROVER CLEVELAND.

Executive Mansion, January 17, 1896.

Appendix II.

Letter of Commissioner Lamoreux,* Department of the Interior, General Land Offices.

Washington, D. C., December 18, 1895.

Sir:

On March 3, 1891, an act of Congress, entitled "An act to repeal the timber-culture laws, and for other purposes," was approved by the President. (26 Stat., 1095.) Section 8 of said act provided, among other things, "that suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issue of such patents". And by another act, approved the same day (26 Stat. L., 1093), entitled "An act to amend section 8 of the act approved March 3, 1891, entitled 'An act to repeal timber-culture laws, and for other purposes'," the same proviso was enacted. It will be observed that this section makes no exception, but applies to all patents.

By act of March 3, 1887 (24 Stat. L. 256) directions were given for the adjustment of all grants by Congress to aid in the construction of railroads, and for the recovery by the United States of title to lands which from any cause have been erroneously certified or patented under such grants, and said act requires that the adjustments be made in accordance with the rulings of the United States Supreme Court. Therefore, as conveyances under these grants date as far back as 1850 and were made under various court and departmental rulings, it is not surprising that many of said conveyances have been and will be found, under the construction now given such grants by the Supreme Court, to have been erroneous.

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* Congressional Record, vol. 28, Part 2, p. 1763.

A number of these grants have been examined with a view to their adjustment, and rules have been laid to show cause why suits should not be instituted for recovery of title in some cases, and demands for reconveyance have been made in others, but very few have been finally adjusted and closed, not more than a dozen; and most of these examinations, nearly all in fact, were made prior to the rulings of the United States Supreme Court in the cases of *Mary Bardon* vs. *Northern Pacific Railroad* (145 U. S. 533) and *Whitney* vs. *Taylor* (158 U. S. 85) which so change the previous rulings of the court, as construed by this Department, as to make necessary a re-examination of all railroad land grants, excepting the few finally closed and some half dozen examined since the decision in the case of *Whitney* vs. *Taylor,* above referred to. The Department so held in its letters of July 18, 1895, in the case of the *St. Louis, Iron Mountain & Southern Railway Company,* and September 5, 1895, in the case of the *Burlington and Missouri River Railroad Company of Iowa.*

There are 79 land-grant railroads and 7 land-grant wagon roads.

Under the provisions of Section 8 of the act of March 3, 1891, as originally passed and amended as aforesaid, the time within which the United States can legally bring suit for the recovery of lands erroneously patented prior to March 3, 1891, will expire March 3, 1896, unless an extension be made by Congress.

The work of adjusting these grants is one of great magnitude and the division of the office charged with its execution is also charged with the consideration and determination of all questions relating to or arising out of conflicts between grants by Congress to aid in the construction of railroads, wagon roads, canals, and river improvements and rights of way over the public lands for railroads, canals, ditches, and reservoirs, and its current work must be kept up. It is also charged with the administration of the grant of desert lands to certain states.

It is clear, therefore, that the time within which the United States may bring suit for the recovery of land erroneously certified or patented under these grants must be extended or that the interests of the government, and in many instances those of private citizens, must suffer. I have accordingly the honor to suggest that Congress be asked to extend such time ten years, or until March 3, 1906, for lands patented prior to March 3, 1891, and ten years from date of patent for lands patented subsequent thereto.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

The Secretary of the Interior.

Appendix III.

Extract of letter from Secretary of the Interior Smith to President Cleveland.*

"Washington, December 27, 1895.

"Sir: I beg leave to invite your attention to the provisions of section 8 of the act of March 3, 1891 (26 Stat. L., 1099), where it is enacted that suits by the United States to vacate and annul any patents theretofore issued 'shall only be brought within five years from the passage of this act,' which, in my opinion and that of the Commissioner of the General Land Office, ought to be repealed. In order that you may fully understand the situation, I beg to submit the following observations:

By the act of March 3, 1887 (24 Stat. L., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted; and it is provided if it shall appear, upon the completion of such adjustment, or sooner, that lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented; and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute, in the proper courts, necessary proceedings to restore title to said lands to the United States.

* * * * * *

The work of adjustment contemplates a disposition of every tract described by the granting act situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those tracts shown to be erroneously certified, and the determination for what tracts lost to the grant indemnity is allowable.

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* Congressional Record, vol. 28, Part 2, p. 1762.

It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads the grants for which conflict or overlap, be finally disposed of so that a proper disposition of the land can be shown in the adjustment.

* * * * * * *

Of course, no suit by the United States to secure the cancellation of a patent in this class of cases after that date would amount to anything. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal in accordance with the provisions of the act of March 3, 1887 (*supra*), before the expiration of which time the statute would bar the right of recovery by the Government.

* * * * * * *

It will be readily seen that if this act of limitations is to remain on the statute books the portion of the adjustment act of 1887, before cited, would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by power of law. By this denial to the Government of the right to go into court and ascertain its rights the railroad companies would profit very largely, as it is a well-known fact, capable of abundant substantiation by the records of the Land Office, that the early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees which, by later decisions, is declared not to have been warranted by law.

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Under these circumstances it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully request that you urge upon Congress to take speedy action, as suggested, that there may be no delay in the adjustment of these grants and no bar, by lapse of time, against the right of recovery by the Government in a proper case."

Appendix IV.

REPORT*

(To accompany H. R. 5474)

On the 17th day of January, 1896, the President sent to Congress a message in relation to the expiration of the limitation provided in the Act of March 3, 1891. Under the Act of March 3, 1887 (24 Stat. L., 256) the Interior Department was directed to adjust all the various railway and other land grants as speedily as practicable and, whenever it was ascertained that lands had been erroneously patented, the law provided that actions should be brought to cancel the same.

Provisions are embraced in the Act of 1887 to protect settlers and purchasers by giving them preferential rights in case of the cancellation of their patents.

These proceedings, of necessity, caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Government by correcting mistakes and overturning fraudulent patents, a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within 5 years, or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within 6 years after the date of the patent.

The Commissioner of the Land Office, on the 18th of December, 1895, addressed a communication to the Secreta-

* House Report 253, 54th Congress, First Session; Congressional Record, vol. 28, Part 2, p. 1761.

of the Interior, suggesting an extension of time by amendment to the Act of 1891. The Secretary of the Interior communicated with the President upon the subject, recommending the repeal of the limitation altogether. Thereupon the President sent a message on the subject to Congress, asking for a repeal of Section 8 of the Act of March 3, 1891.

We will set forth in an appendix to this report the message and other communications above referred to.

The Committee on the Public Lands have patiently examined the whole subject and invited before them all persons interested in the question, as also the Assistant Attorney General for the Department of the Interior and the Commissioner of the General Land Office.

There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioner of the General Land Office was of the opinion that it would require 10 years more to adjust the grant under the Act of 1887, and therefore thought the limitation should be extended 10 years.

In the adjustment of these grants, it is not practicable for more than from 2 to 4 clerks in the General Land Office to work at one time without having duplicates made of certain lists or records. With this small force the adjustment has slowly proceeded for the last 9 years, and over 60,000,000 acres still remain unadjusted. It appears, however, that by active diligence about 12,000,000 acres have been adjusted in the last year. At this rate the work could be completed in 5 years more.

But even if it could not be done with the present force, the Committee are of the opinion that duplicate copies of the leases and documents or records ought to be made to expedite this work, and that the time ought not to be extended more than 5 years.

While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these patented grants should be given, it is also of the highest importance that the validity of the Government

patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patent issued by the highest authority of the nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

Under existing law, and in the absence of any limitation, a settler may buy a home upon one of these grants, and after occupying it for years under the faith of a patent regularly issued and recorded, find himself made a party to a long, vexatious, and expensive litigation, and in the end be permitted to buy the land again from the Government or to enter it under the Homestead laws.

That such a thing may occur for a reasonable time is perhaps the necessary consequence of fraud and mistake in patents, but that such a condition should be kept open without limit is an intolerable blemish upon the titles purporting to come from the Government. If a private individual sells and conveys lands, and they pass into innocent hands, the purchaser is protected as against his grantor, and time will protect him against all comers. But as against the United States, in the absence of a limitation law, he is never secure and may be subjected to annoyance and expense and possible loss of his land at any time.

A private individual may have obtained a patent for a homestead, tree claim, or pre-emption claim, and, after selling the same, the purchaser, who has bought upon the faith of the Government patent, may be harassed by proceedings in the courts hundreds of miles away, with a possible appeal to the expensive forms of the court of appeals and the still more expensive and clogged tribunal of the United States Supreme Court.

To remedy these defects the Act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not been found practicable to adjust them within so short a time, we think that a bill giving 5 years longer limitation ought to pass, but we do not believe that this

extension of time ought to affect bona fide purchasers; that, as to them, the limitation of the Act of 1891 ought to operate as a final bar when the time first limited shall expire.

But as to the original patentees, no great injustice will be done to them by extending the time 5 years longer, and within that time we think that the grants can all be adjusted. The shortness of this time, it is true, may put the Interior Department to some inconvenience, and it may involve some extra expense for clerical work, but the importance of bringing to an end all disputes upon the part of the Government as against its own patent titles is so evident as to need but little argument in its support.

Your Committee have prepared and presented a bill which will carry out the purposes outlined in this report, and we recommend its passage.

We cannot agree with the President that public policy requires that there should be no limitation as against the Government in these cases.

We have had unpleasant object lessons in many of the Spanish grants, whose limits are as elastic and uncertain as the Venezuelan boundary. The presence of these disputed titles has cast a blight over some of our most beautiful lands for more than a generation. There should be some time fixed when such a condition shall cease to exist.

The limitation may perfect titles in some instances founded in more or less fraud or mistake. So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes.

Most of the states of the Union have adopted statutes which will bind the states themselves. Such statutes have been found to work well. To require the Sovereign power to proceed in a reasonable time if it wishes to void or nullify its own acts is a just provision in behalf of its individual citizens. The absence of limitation excuses delays on the part of officials, and that which may be done at any time, however distant in the future, is much less likely to be attended to in the present.

We are informed that as to some of these land grants the greater part that has been patented has been sold to third persons. That was the very purpose of the land grants. It was not intended that these grants in aid of public improvements should be tied up indefinitely and withheld from settlement.

It was the theory of the projectors of such enterprises that these lands would be brought into markets by the building of railways and that the railway companies would be interested in selling them on long time at low prices and at low rates of interest to actual settlers who would furnish a carrying business for the new lines. It ought not to be the policy of the Government to harass or annoy one of these settlers by any litigation whatever.

The policy of making railway grants has been long since abandoned. The adjustment of those made should proceed with all reasonable speed so that the transactions may be closed.

The railway companies themselves have encouraged delay by failing to procure their patents in order to avoid local taxation. One of the purposes of the Act of 1891 was to encourage the patenting of such lands so that they might become subject to such taxation, and that their sale and settlement might be encouraged.